

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR BIOLOGICAL DIVERSITY; and)
SIERRA CLUB,)

Plaintiffs,)

v.)

DAVID BERNHARDT, in his official capacity)
as Secretary of the United States Department of)
the Interior; ARELIA SKIPWITH, in her official)
capacity as Director of the United States Fish and)
Wildlife Service; UNITED STATES FISH AND)
WILDLIFE SERVICE; and UNITED STATES)
FOREST SERVICE,)

Defendants,)

and)

UPPER GREEN RIVER CATTLE)
ASSOCIATION; SOMMERS RANCH, LLC;)
PRICE CATTLE RANCH; MURDOCK LAND)
AND LIVESTOCK CO.; and WYOMING)
STOCK GROWERS ASSOCIATION,)

Applicants in Intervention.)

No. 1:20-cv-00855-APM

**MEMORANDUM IN SUPPORT OF
DEFENDANT-INTERVENORS’
MOTION TO INTERVENE**

Applicants for Intervention, the Upper Green River Cattle Association (“UGRCA”); Sommers Ranch, LLC; Price Cattle Ranch; Murdock Land & Livestock Co.; and the Wyoming Stock Growers Association (“WSGA”) (collectively “Ranchers”), hereby file this Memorandum of Points and Authorities in Support of their Motion to Intervene in the above-captioned case.

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INTRODUCTION

The intervention sought here is supported by this Court’s previous grant of intervention in an essentially identical case last month. The instant litigation is a companion case to *W. Watersheds Project v. U.S. Forest Serv.*, No. 1:20-cv-860-APM (D.D.C. March 31, 2020), and the underlying factual and legal questions are almost indistinguishable. Both of these cases challenge the management of grizzly bear populations in the Upper Green River Allotment of the Bridger-Teton National Forest on the basis of alleged Endangered Species Act violations. Intervenors here are the same ranchers and cattle associations that were granted intervention previously, the same federal agencies are defendants here as in the parallel case, and the grazing allotment and public lands are the same. The only differences here are: (1) the presence of different environmentalist plaintiffs; (2) the absence of a claim concerning the management of the Kendall-Warm Springs dace; and (3) the absence of a motion for preliminary injunction. None of these differences alter the legal and factual basis for intervention, however.

As in the parallel case, Plaintiffs here assert that Defendants violated Sections 7 and 9 of the Endangered Species Act (“ESA”) by reauthorizing the continued cattle grazing on six allotments constituting the Upper Green River Area Rangeland Project. The 170,000-acre project area implicated by this grazing reauthorization has been continuously utilized by UGRCA members, and others, since the late 1800s. The area also contains habitat for grizzly bears, a species currently listed as “threatened” under the ESA.¹ Accordingly, prior to issuing its

¹ Beginning in 2005, and continuing each year since, the Greater Yellowstone Ecosystem population of grizzly bear has met the criteria for recovery set forth in the Endangered Species Act. As a result, FWS has twice attempted to delist this population segment. 70 Fed. Reg. 69,854 (Nov. 17, 2005); 82 Fed. Reg. 30,502 (June 30, 2017). Although both attempts were set

decision to reauthorize grazing within the Project area, the Forest Service consulted with the U.S. Fish & Wildlife Service (“FWS”) concerning grizzly bear management as required by the ESA. The end result of this consultation was a Biological Opinion (“BiOp”) issued in 2019 (and an associated Incidental Take Statement), which listed a series of conservation measures concerning bear management and concluded that these management techniques posed “no jeopardy” to grizzly bear recovery. Plaintiffs contend that the “no jeopardy” determination of the 2019 BiOp and Incidental Take Statement are flawed because they allegedly do not properly assess impacts to grizzly populations and are not based on the best science available.

Plaintiffs seek to set aside the 2019 BiOp and Incidental Take Statement. As these documents form the basis for the Forest Service’s decision to reauthorize grazing on the six allotments in question, the Ranchers’ lawful livestock operations are directly at risk from Plaintiffs’ requested relief.

aside for procedural defects, neither reviewing court held that the bear population failed to meet the recovery criteria established for it. *See Greater Yellowstone Coal., Inc. v. Servheen*, 665 F.3d 1015 (9th Cir. 2011) (set aside for failure to consider whitebark pine seed availability); *Crow Indian Tribe v. U.S.*, 343 F. Supp. 3d 999 (D. Mont. 2018) (set aside for failure to consider delisting’s effect on the “remnant” population and for further discussion of the recalibration provision), *aff’d in part*, No. 18-36030, 2020 WL 3831636 (9th Cir. July 8, 2020).

BACKGROUND

I. FACTUAL BACKGROUND

A. The Green River Drift and Green River Drift Trail

Central to this case is Ranchers' use of the Upper Green River Cattle Allotment located within the Upper Green River Area Rangeland Project. The Upper Green River Cattle Allotment is accessed by use of the Green River Drift and Green River Drift Trail, which is the oldest continually used, traditional cattle drive in the State of Wyoming, and perhaps the United States. Declaration of Albert Sommers ("Sommers Decl.") ¶ 36 (attached hereto as Exhibit A). Since at least 1896, the Green River Drift has functioned as the essential connector between seasonal grazing lands for cattle ranches in the Upper Green River Valley. *Id.* ¶ 23. Indeed, use of the Drift began when the grazing of public lands in the Green River Valley region was still free and unregulated. *Id.* Ranches in the Upper Green River Valley region, including the Sommers Ranch, LLC, the Price Cattle Ranch, and the Murdock Land and Livestock Co., are dispersed along waterways and valleys that contain irrigable land for producing hay. *Id.* ¶ 24. Grazing land is located further out on the surrounding mesa, desert, foothill, and mountain pastures based on a seasonal feeding pattern. *Id.* The Green River Drift Trail provides the route for Upper Green River Cattle Association members and other area ranchers to trail cattle from spring grazing at the southern end of the Drift to summer and fall grazing at the northern end. *Id.* ¶ 25. In the fall, the cattle "drift" back to the south on their own back along the route of the Drift and are then sorted and trailed to their home ranches. *Id.*

The Green River Drift Trail extends for 68 miles, from high desert mesas in the southern part of the county to the Bridger-Teton National Forest in the northern part of the county. *Id.* ¶

26. The path of the Drift makes use of natural features such as draws and creeks to funnel the cattle onto a common path and provide a stable supply of water and feed. *Id.* ¶ 27. Overall, the route and use of the Drift today is very similar to its route and use in its early history. *Id.* The Green River Drift follows the Green and New Fork Rivers for much of its route and has the Wind River Mountains as its backdrop to the north and east, the Wyoming Range in the far distance to the west, and the Gras Venture Mountains to the north. *Id.* ¶ 28.

In the spring, starting from May 1 through May 25, Upper Green River Cattle Association members graze their cattle on Bureau of Land Management (“BLM”) grazing allotments on the Little Colorado Desert or the Green River Mesa. *Id.* ¶ 29. Spring grazing on BLM managed land lasts about two months: May through June. *Id.* Cowboys start removing cattle from spring BLM pastures and trailing them up to 68 miles north beginning the middle of June and ending the middle of July. *Id.* ¶ 30. There is a 3 to 4-week period for trailing the cattle to the mountains from the time they are taken off the spring pasture until they are on the pasture systems on National Forest land. *Id.* Each ranch’s cattle herd is on the trail approximately two weeks. *Id.* Summer grazing begins June 16 and lasts through October 15 of every year. *Id.* ¶ 31. The haying season on private lands corresponds with the summer grazing season on public lands. *Id.*

As cold weather arrives in the late fall, the cattle drift back out of the forest on their own, moving south back toward their home pastures. *Id.* ¶ 32. Strategically located fences direct their movement down to the sorting grounds where they are sorted by brand, rounded up, trailed to their respective home ranches, and shipped to market in October and November. *Id.* In the winter, cattle graze on the hayed pastures and meadows at their respective home ranches. *Id.*

¶ 33. As the pastures become snow-covered, the livestock are fed from the hay supply that grew in the same fields over the spring and summer. *Id.* This seasonal pattern has been repeated, year after year, since at least the 1890s. *Id.* ¶ 34. Ranchers rely on the Drift to trail their cattle to crucial pasturage and continue to pass this tradition on to the next generations. *Id.* In fact, the pasturage accessed via the Drift is *essential* to the ranchers' operations because of the feed it provides to growing cattle, and the time it gives private land to grow the next hay crop, which will feed the cattle herds during the next winter. *Id.* ¶ 35.

In November 2013, the Green River Drift Trail was listed in the National Register of Historic Places as a Traditional Cultural Property ("TCP"). *Id.* ¶ 36. The Drift is representative of a rural community's land use patterns and reflects the local ranchers' traditional occupational culture, including shared practices, customs, and beliefs. *Id.* It is the oldest continually used stock drive in Wyoming and is one of the only remaining cattle trails still in use in the same manner in which it was originally developed. *Id.* Moreover, the Drift is the first listed TCP in the nation to recognize a traditional culture rooted in a shared occupation—ranching—rather than in ethnicity or religious belief. *Id.*

B. The Upper Green River Cattle Association and Upper Green River Cattle Allotment

The Upper Green River Cattle Association was established in 1916, and consists of most of the ranchers operating in the Upper Green River Valley and utilizing the Green River Drift. *Id.* ¶ 37. The Association also maintains a common allotment, the Upper Green River Allotment, on the Bridger-Teton National Forest. *Id.* ¶ 38. The Upper Green River Allotment consists of more than 130,000 acres, making it one of the largest allotments in the National Forest System. *Id.* ¶ 39. This allotment is held for the common use of Association members and authorizes

grazing of over 6,800 cow/calf pairs or yearlings, owned individually by Association members. *Id.*

The Upper Green River Allotment is divided into 13 pastures and four pasture rotations. *Id.* ¶ 40. Other areas within the Allotment are designated for common use as livestock driveways, which are utilized by cattle as they enter the Allotment and their primary pastures, and as they “drift” back from their primary pastures. *Id.* Association members are responsible for the maintenance and upkeep of common improvements, including fencing and rider cabins. *Id.* ¶ 41. The Association hires five range riders to oversee their cattle in these four pasture systems. In fact, the Association has had range riders with their cattle almost every day of use of the Upper Green River Cattle Allotment since 1916. *Id.* ¶ 42.

C. The Renewal of the Upper Green River Project Grazing Allotments

On July 23, 2003, the Forest Service announced its intent to prepare an environmental impact statement (“EIS”) to analyze the environmental impacts of renewing six grazing allotments for 10-years, including the Upper Green River Cattle Allotment. Upper Green River Area Rangeland Project, Final Environmental Impact Statement (“Final EIS”)² at 23. A final EIS and record of decision were released in October 2004; however, the record of decision was later withdrawn to conduct additional analysis. *Id.* A notice of intent to prepare a supplement was then published in the Federal Register in December 2009, and a draft supplemental EIS was released for public review in June 2010. *Id.* Again, in order to conduct yet more additional analysis, a draft EIS to replace the 2004 analysis was prepared and released for public review in

² Available at https://www.fs.usda.gov/nfs/11558/www/nepa/3077_FSPLT3_4092241.pdf.

November 2016. *Id.* at 23–24. On October 27, 2017, the Final EIS was released, with a record of decision being issued nearly two years later, on October 11, 2019. *See* 82 Fed. Reg. 49,802 (Oct. 27, 2017).

Two biological opinions (“BiOp”) issued pursuant to Section 7 of the Endangered Species Act are central to Plaintiffs’ challenges. First, on April 29, 2019, FWS issued a biological opinion in which it found that renewing these grazing allotments was not likely to jeopardize the recovery of the grizzly bear, and authorized the take of up to 72 grizzlies over the 10-year project term (2019–2028). *See* Biological Opinion for the Effects to the Grizzly Bear from the Upper Green River Area Rangeland Project (“2019 BiOp”).³ The incidental take statement (“ITS”) associated with this BiOp included numerous terms and conditions to protect the long-term viability of grizzly and to ensure that the action would not lead to jeopardy. *Id.* at 49. Further, although the ITS allows for the take of up to 72 bears over 10-years, the ITS requires that take be evaluated on a rolling three-year basis, such that if take exceeds a specified number in any year, or in the rolling three-year period, then FWS mandates that consultation be re-initiated. *Id.* at 47–49. The second BiOp, dated September 3, 2014, amended an earlier biological opinion providing an ITS concerning the authorized lethal removal of nuisance grizzly bears associated with the earlier Upper Green River Area Rangeland Project authorization. *See* Biological Opinion for the 2014 Supplement to the 2013 Supplement and 2010 Amendment to

³ Available at https://www.fs.usda.gov/nfs/11558/www/nepa/3077_FSPLT3_4876414.pdf

the 1999 Biological Assessment for Livestock Grazing on the Northern Portions of the Pinedale Ranger District (“2014 BiOp”).⁴

II. PROCEDURAL BACKGROUND.

This lawsuit was filed contemporaneously on March 31, 2020 with another case before this Court, *W. Watersheds Project v. U.S. Forest Serv.*, No. 1:20-cv-860-APM (D.D.C. March 31, 2020). (“WWP case”). Ranchers were granted intervention as of right in the WWP case on June 1, 2020. WWP Case, ECF No. 36.

The suits filed by Plaintiffs here and the environmental plaintiffs in the WWP case are essentially identical because they both claim that the new levels of problem bear removals authorized in the 2019 BiOp violate the ESA. The only substantive differences in the two lawsuits are: (1) Plaintiffs here do not challenge the management actions concerning the Kendall-Warm Springs dace, which plaintiffs in the WWP case did; and (2) Plaintiffs here did not file a motion for preliminary injunction seeking to prohibit the lethal removal of problem bears, which plaintiffs in the WWP case did. WWP Case, ECF No. 1. In the WWP case, Ranchers did not take issue with the claims concerning the Kendall-Warm Springs dace because they can simply divert their cattle around the dace habitat and avoid any impacts to the species. WWP Case, ECF No. 21. Also, the Court denied the motion for preliminary injunction in that case, holding that plaintiffs there had not demonstrated “irreparable harm” for purposes of injunctive relief. WWP Case, ECF No. 46.

⁴ Available at https://www.fs.usda.gov/nfs/11558/www/nepa/3077_FSPLT3_2336978.pdf.

III. DESCRIPTION OF APPLICANTS IN INTERVENTION.

The Upper Green River Cattle Association (“UGRCA”) is a local trade association founded in 1916, consisting of eleven member ranches operating in the Upper Green River Valley of southwestern Wyoming and utilizing the Green River Drift. Sommers Decl. ¶¶ 37–39. In making use of the Upper Green River Allotment as described above, UGRCA’s stewardship of the public lands is integral to not only the economic wellbeing of the individual members, but also a necessary aspect of preserving the historical and cultural significance of the Green River Drift Trail as a TCP. *Id.* ¶¶ 22, 23, 36, 41–44. Relatedly, UGRCA has a vital interest in proper wildlife management, particularly the management of grizzly bears. *Id.* ¶¶ 45–51. While lethal removals of certain nuisance grizzly bears should be a last resort that is sparingly employed, it is nonetheless the only management tool that ensures the safety of UGRCA members’ ranch personnel and livestock in the event that attacks and depredation by grizzly bears are not otherwise dissuaded. *Id.* ¶ 52. As such, the outcome of this dispute over proper grizzly bear management techniques will impact, the future of UGRCA members’ livestock operations.

Albert Sommers is the President of the UGRCA and managing member of Sommers Ranch, LLC. *Id.* ¶ 4. The Sommers Ranch is a historic livestock operation located in Sublette County, Wyoming, founded in 1907 by Albert “Prof” Sommers (Mr. Sommers’ grandfather) and Pearl Sommers (Mr. Sommers’ great-uncle). *Id.* ¶ 11. In 2009, a portion of the Sommers Ranch was listed on the National Register of Historic Places. *Id.* ¶ 13. The Sommers Family has maintained their ranch for over 100 years in the same manner that their ancestors did. *Id.* ¶ 14. Due to its exemplary stewardship and collaborative management efforts, the Sommers Ranch was recognized with the Leopold Conservation Award in 2012. *Id.* ¶ 15. The Sommers Ranch

has utilized the Green River Drift and the Green River Drift Trail since around 1900. *Id.* ¶ 22. Mr. Sommers is the current holder of a grazing permit for the Upper Green River Cattle Allotment and is authorized to graze 300 cow/calf pairs. *Id.* ¶¶ 12, 16, 22.

Charles Price is the owner and operator of the Price Cattle Ranch and member of both the UGRCA and WSGA. Declaration of Charles Price (“Price Decl.”) ¶¶ 5, 6 (attached hereto as Exhibit B). The Price Cattle Ranch is a historic livestock operation located in Sublette County, Wyoming, founded in 1900 by Alexander Price, who was also a founding member of the UGRCA. *Id.* ¶ 5. The Price family has maintained their ranch for over 100 years in the same manner that their ancestors did. *Id.* ¶¶ 5, 7. The Price Cattle Ranch has utilized the Green River Drift and the Green River Drift Trail since around 1900. *Id.* ¶ 12. Mr. Price is the current holder of a grazing permit for the Upper Green River Cattle Allotment and is authorized to graze 400 cow/calf pairs. *Id.* ¶¶ 9, 13.

Margaret Jeanne Lockwood is a shareholder of Murdock Land & Livestock Co. and a member of both UGRCA and WSGA. Declaration of Margaret Jeanne Lockwood (“Lockwood Decl.”) ¶¶ 5, 6 (attached hereto as Exhibit C). The Murdock Land & Livestock Co. operates the Murdock Ranch in Sublette County, Wyoming, a historic ranch that was established by Mrs. Lockwood’s ancestors in 1892 and has been maintained by the family ever since. *Id.* ¶¶ 3–5. The Murdock Ranch has utilized the Green River Drift and the Green River Drift Trail since around 1900. *Id.* ¶ 12. Mrs. Lockwood is the current holder of a grazing permit for the Upper Green River Cattle Allotment and is authorized to graze 300 cow/calf pairs. *Id.* ¶¶ 9, 13.

The Wyoming Stock Growers Association (“WSGA”) is a statewide trade association dedicated to representing the interests of livestock operators in Wyoming. Founded in 1872,

WSGA has served as the voice of the cattle industry in Wyoming for over a century, with members in every county of the state. Declaration of Jim Magagna (“Magagna Decl.”) ¶ 4 (attached hereto as Exhibit D). WSGA was founded with the purpose of advancing, protecting, and promoting the cattle industry in Wyoming and to advocate on behalf of livestock operators on issues of importance to cattle producers and feeders. Over the years, WSGA has defended the interests of their constituents through litigation as well as by pushing for legislative reform. *Id.* ¶ 5; *see, e.g., W. Watersheds Project v. Schneider*, 417 F. Supp. 3d 1319 (D. Idaho 2019). The Upper Green River Cattle Allotment is grazed by WSGA members and preserving the viability of public lands ranching in Wyoming is of paramount importance to WSGA. Magagna Decl. ¶ 6.

ARGUMENT

I. RANCHERS SHOULD BE GRANTED INTERVENTION AS OF RIGHT.

To begin with, the Court has already granted intervention as of right to Ranchers in the related WWP case, which is essentially identical to instant lawsuit. The Court first held that Ranchers satisfied the four conditions of intervention as of right. WWP Case, ECF No.36 at 1 (citing Fed. R. Civ. P. 24(a) and *Amador Cty. v. U.S. Dep’t of the Interior*, 772 F.3d 901, 903 (D.C. Cir. 2014)). In addition, the Court held that Ranchers had standing per the D.C. Circuit’s holding in *Crossroads Grassroots Policy Strategies v. Fed. Election Comm’n*, 788 F.3d 312, 316-17 (D.C. Cir. 2015) (“generally [has] found a sufficient injury in fact where a party benefits from agency action, the action is then challenged in court, and an unfavorable decision would remove the party’s benefit.”). The Court held that the principle articulated in *Crossroads* “applies squarely with respect to the Ranchers” because the plaintiffs in the WWP case sought to prohibit all lethal take of problem grizzly bears, which “clearly establishes the Ranchers’

standing and an impairment of a cognizable interest.” WWP Case, ECF No. 36 at 1-2. While Plaintiffs in this case have not explicitly sought an injunction prohibiting lethal removals of grizzly bears, they nonetheless challenge the amount of authorized removals as being excessive. *See* ECF No. 1, ¶ 39 (alleging that grazing causes negative impacts). Moreover, Plaintiffs apparently reserve the right to seek such relief in the future. *See* ECF No. 1, Request for Relief ¶ 3 (asking the Court to “[e]njoin all implementation of the Project unless and until Defendants demonstrate compliance with the ESA”). Because the increased presence of problem bears inevitably leads to increased depredation on livestock, the Court’s reasoning still applies in this context.

Beyond this, Ranchers in this case independently satisfy the requirements for intervention as of right. Federal Rule of Civil Procedure 24(a) allows a party to intervene where it “claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest, unless existing parties adequately represent that interest.” Fed. R. Civ. P. 24(a). Thus, a party seeking intervention must demonstrate: “(1) timeliness; (2) a cognizable interest; (3) impairment of that interest; and (4) lack of adequate representation by existing parties.” *Smoke v. Norton*, 252 F.3d 468, 470 (D.C. Cir. 2001) (citing *Williams & Humbert, Ltd. v. W. & H. Trade Marks, Ltd.*, 840 F.3d 72, 74 (D.C. Cir. 1988)). The D.C. Circuit has also held that intervenors must have Article III standing to intervene as of right. *Crossroads*, 788 F.3d at 312; *Rio Grande Pipeline Co. v. F.E.R.C.*, 178 F.3d 533 (D.C. Cir. 1999). Because Applicants satisfy each of the required elements, this Court should grant their motion to intervene as of right.

A. Ranchers Have Standing.

“The standing inquiry for an intervening-defendant is the same as for a plaintiff: the intervenor must show injury in fact, causation, and redressability.” *Crossroads*, 788 F.3d at 316 (citing *Deutsche Bank Nat. Trust Co. v. F.D.I.C.*, 717 F.3d 189, 193 (D.C. Cir. 2013)). Ranchers meet each of these requirements.

Concerning the first element, the D.C. Circuit has “found a sufficient injury in fact where a party benefits from agency action, the action is then challenged in court, and an unfavorable decision would remove the party’s benefit.” *Id.* at 317. This is the exact situation Ranchers find themselves in. Applicants Sommers Ranch, LLC, Price Cattle Ranch, and Murdock Land & Livestock Co. all benefit directly from the authorization to graze public lands granted by the Forest Service. Because these individual permittees are members of the UGRCA and WSGA, these organizations gain the benefit enjoyed by their constituents, which in turn further the broader goals of local and regional stability of the Western livestock industry and the communities and traditional cultures that rely on it. Sommers Decl. ¶¶ 54–57; Magagna Decl. ¶¶ 6–8. Conversely, the relief sought by the Plaintiffs here directly threatens the viability of the Upper Green River Area Rangeland Project, and a victory for Plaintiffs would destroy the benefit of Ranchers’ grazing reauthorization since it would make it impossible for the permittees to have successful livestock operations. Sommers Decl. ¶ 53, Magagna Decl. ¶ 9; *see, e.g., Connecticut v. U.S. Dep’t of the Interior*, 344 F. Supp. 3d 279 (D.D.C. 2018) (failure of Secretary of Interior to authorize gambling enterprise constituted injury-in-fact for Indian tribe).

As to the other two elements of the standing analysis, causation and redressability flow from injury-in-fact. In *Crossroads*, the D.C. Circuit held that “if [a defendant-intervenor] can

prove injury, then it can establish causation and redressability,” 788 F.3d at 316. The fact that Ranchers’ injuries stem from Plaintiffs’ attempt to overturn a legal and favorable administrative action means that “it rationally follows the injury is directly traceable” to Plaintiffs’ lawsuit. *Id.* Similarly, if Ranchers’ injuries are directly traceable to Plaintiffs’ lawsuit, then it stands to reason that a judgment denying Plaintiffs’ requested relief will necessarily redress Ranchers’ injuries.

As such, Ranchers have demonstrated their standing because they have shown injury-in-fact, causation, and redressability as it relates to Plaintiffs’ challenge to grizzly bear management and grazing authorization on the Upper Green River Area Rangeland Project and the Upper Green River Cattle Allotment.

B. Ranchers’ Motion to Intervene is Timely.

Courts retain wide discretion in considering the timeliness of a motion to intervene so long as they “properly take account of the considerations relevant to that determination.” *Smoke*, 252 F.3d at 471. Such considerations include the “time elapsed since the inception of the suit, the purpose for which intervention is sought, the need for intervention as a means of preserving the applicant’s rights, and the probability of prejudice to those already parties in the case.” *U.S. v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1295 (D.C. Cir. 1980) (“*AT&T*”). Though the amount of time that has passed since a case was initiated is relevant, “[t]he most important consideration in deciding whether a motion for intervention is untimely is whether the delay in moving for intervention will prejudice the existing parties to the case.” *Roane v. Leonhart*, 741 F.3d 147, 152 (D.C. Cir. 2014) (quoting 7C Charles Alan Wright et al., *Federal Practice and Procedure* § 1916, at 532 (3d ed. 2007)).

Here, Plaintiffs filed their Complaint on March 31, 2020. ECF No. 1. The Federal Defendants filed their Answer on July 7, 2020. ECF No. 16. The State of Wyoming filed its motion to intervene on July 8, 2020. ECF No. 17. The administrative record has not yet been lodged, no briefing schedule has been established, and no dispositive pleadings have been filed. Indeed, this case remains in its infancy. Accordingly, the existing parties will not be prejudiced by the Ranchers' intervention. The Motion is timely.

C. Ranchers Have a Legal Interest in the Subject of this Action.

Federal Rule of Civil Procedure 24(a) requires an applicant in intervention to have a cognizable interest in the property or transaction relevant to the lawsuit. *See Smoke*, 252 F.3d at 470. “[P]roposed intervenors of right ‘need only an ‘interest’ in the litigation—not a ‘cause of action’ or ‘permission to sue.’” *Friends of Animals v. Kempthorne*, 452 F. Supp. 2d 64, 69 (D.D.C. 2006) (quoting *Jones v. Prince George’s Cty., Maryland*, 348 F.3d 1014, 1018 (D.D.C. 2003)). Moreover, an interest in the promulgation of a challenged rule or other final agency action is enough to satisfy this requirement. *See id.* This requirement “is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.” *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967).

As demonstrated in Part I(A), *supra*, Ranchers have Article III standing, which “is alone sufficient to establish that [Ranchers have] an interest relating to the property or transaction which is the subject of the action.” *See Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003) (internal quotation omitted); *see also Mova Pharma. Corp. v. Shalala*, 140 F.3d 1060, 1076 (D.C. Cir. 1998) (“[An applicant for intervention] need not show anything more than

that it has standing to sue in order to demonstrate the existence of a legally protected interest for purposes of Rule 24(a).”). As this Court recognized in the WWP case, the factors that establish Ranchers have Article III standing—the loss or significant diminishment of their federal grazing authority caused by grizzly bear management restrictions, the cultural impact to the Upper Green River Drift’s status as a Traditional Cultural Property, the loss or the reduction of the individual ranchers’ allotments, and the injury to Wyoming’s ranching community—also satisfy Rule 24(a)’s legally protected interest requirement for intervention.

D. Disposition of This Action Will Impair or Impede Ranchers’ Interests.

To determine whether a potential intervenor’s interests will be impeded, courts consider “the practical consequences of denying intervention, even where the possibility of future challenge . . . remains available.” *Fund for Animals*, 322 F.3d at 735 (internal quotation omitted) (citing *Nat. Res. Defense Council v. Costle*, 561 F.2d 904, 909 (D.C. Cir. 1977)). For example, the mere possibility of future judicial review “afford[s] much less protection than the opportunity to participate in . . . proceedings” *Nat. Res. Defense Council*, 561 F.2d at 909. Even the “possibility” of impairment of an intervenor’s interest is sufficient to satisfy this standard. *Foster v. Guery*, 655 F.2d 1319, 1325 (D.C. Cir. 1981).

If this Court grants Plaintiffs’ requested relief, the ranches that depend on the Upper Green River Drift could be destroyed or reduced to a mere fraction of their current levels because the draconian management restrictions will render these operations economically unviable. Sommers Decl. ¶¶ 53, 55; Lockwood Decl. ¶¶ 13–15; Price Decl. ¶¶ 13–15. Such an outcome would defeat the entire purpose for the creation of the UGRCA a century ago, Sommers Decl. ¶ 37, and the loss of such an important aspect of Wyoming’s ranching culture would be a serious

detriment to the goals of WSGA. Magagna Decl. ¶¶ 4, 7–10; Lockwood Decl. ¶ 12; Price Decl. ¶ 12. The loss of these ranches would in turn significantly harm the local economy. Sublette County, Wyoming is largely depending on ranching and agriculture for its well-being; the loss in cattle sales alone could deprive the County of \$3 to \$5 million annually. Sommers Decl. ¶ 57. This economic harm would also entail serious impacts on the cultural heritage of Wyoming’s Upper Green River Valley, and the loss of these historic, hundred-year old ranches would eradicate the living connection to history that made the Upper Green River Drift a designated Traditional Cultural Property. Moreover, ironically, the harm caused by granting the Plaintiffs’ requested relief would also be environmental: the loss or significant diminishment of livestock operations within the Upper Green River Valley would change the migration routes of large ungulate populations and otherwise affect wildlife habitat in the area, altering the regional landscape and, potentially, opening the area to development if defunct ranches are sold and subdivided. Sommers Decl. ¶ 56.

E. Ranchers’ Interests Are Not Represented by the Existing Parties.

Federal Rule of Civil Procedure 24(a) requires the party requesting intervention to demonstrate that its interests may be inadequately represented; however, this requirement “should be treated as minimal.” *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972). A motion to intervene should be granted ““unless it is clear that [an existing] party will provide adequate representation for the absentee.”” *Fund for Animals*, 322 F.3d at 735 (quoting *AT&T*, 642 F.2d at 1293).

The existing parties will not provide adequate representation because it is axiomatic that an agency cannot adequately represent another party given the broad scope of considerations that

any agency decision must reflect. Because the Federal Defendants are litigating on behalf of the general public, they are obligated to consider a wide spectrum of views, many of which may conflict with the particular interest of the Ranchers. *See Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1498 (9th Cir.1995), *abrogated on other grounds by Wilderness Society v. U.S. Forest Service*, 630 F.3d 1173, 1177–80 (9th Cir. 2011) (citing *Sierra Club v. Espy*, 18 F.3d 1202, 1208 (5th Cir. 1994)). Indeed, the Federal Defendants are required to represent a broader view than the narrow, focused interests of Ranchers. *See Mille Lacs Band of Chippewa Indians v. Minnesota*, 989 F.2d 994, 1000–01 (8th Cir. 1993) (because the landowner’s individual interests were not shared by the general state citizenry, the State defendant would not adequately represent those interests); *Conservation Law Found. of New England, Inc. v. Mosbacher*, 966 F.2d 39, 44–45 (1st Cir. 1992) (Secretary’s judgments are necessarily constrained by his view of the public welfare).

Indeed, as this Court has previously stated, “we have often concluded that governmental entities do not adequately represent the interests of aspiring intervenors.” *Fund for Animals*, 322 F.3d at 736. Where the federal government is charged with representing the interests of all its citizens throughout the United States, Ranchers’ interests are “more narrow and ‘parochial.’” *Id.* at 735–37 (quoting *Dimond v. Dist. of Columbia*, 792 F.2d 179, 192–93 (D.C. Cir. 1986)). The federal Defendants “would be shirking [their] duty were [they] to advance this narrower interest at the expense of its representation of the general public interest.” *Dimond*, 792 F.2d at 193. Here, Ranchers’ interests in safeguarding the continued viability of their threatened ranches and traditional way of life—as well as the rural communities that depend on the historic ranches of

the Upper Green River Valley—are clearly both specific to them and narrower than the interests of the Federal Defendants.

II. RANCHERS SATISFY THE REQUIREMENTS FOR PERMISSIVE INTERVENTION.

Alternatively, Ranchers should be granted permissive intervention. “[P]ermissive intervention is an inherently discretionary enterprise.” *Equal Emp’t Opportunity Comm’n v. Nat’l Children’s Ctr., Inc.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998) (citing *Hodgson v. United Mine Workers of Am.*, 473 F.2d 118, 125 n.36 (D.C. Cir. 1972)). Federal Rule of Civil Procedure 24(b) allows for intervention where an intervenor files a timely motion and “has a claim or defense that shares with the main action a common question of law or fact.” Fed. R. Civ. P. 24(b). The rule states that courts should “consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.” Fed. R. Civ. P. 24(b)(3). In addition to the federal rules, the D.C. Circuit also requires that an applicant in intervention present “an independent ground for subject-matter jurisdiction.” *Nat’l Children’s Ctr.*, 146 F.3d at 1046. Applicants for permissive intervention are not required to show the same legally protectable interests or inadequate representation necessary for intervention as of right, however.

In this case, Ranchers have defenses to the claims asserted by Plaintiffs and to the relief being sought, which seeks to alter grizzly bear management and grazing authorization on the Upper Green River Cattle Allotment based on factual assertions that raise common questions of fact and law. In addition, there would be neither prejudice to the original parties nor undue delay. The administrative record has not yet been lodged, no briefing schedule established, no consolidation of cases, and no dispositive motions filed; accordingly, there is no reason why granting Ranchers intervenor status would prejudice the rights of the original parties. *See Nat’l*

Children's Ctr., 146 F.3d at 1046. Thus, at a minimum, this Court should grant Ranchers permissive intervention because Ranchers' defenses to the claims asserted by Plaintiffs raise common questions of fact and law.

CONCLUSION

For the foregoing reasons, this Court should grant Ranchers intervention as of right, or, in the alternative, permissive intervention.

DATED this 13th day of July 2020.

Respectfully submitted:

/s/ Brian E. Gregg

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CERTIFICATE OF SERVICE

I hereby certify that on July 13, 2020, I electronically transmitted the attached document to the Clerk's office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to all parties or counsel of record, as more fully reflected on the Notice of Electronic Filing.

s/ Brian E. Gregg